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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 509

MORTON SOBELL, PETITIONER

v.

ATTORNEY GENERAL OF THE UNITED STATES

AND

DIRECTOR, UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. B).

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1968 (Pet. App. C). The petition for a writ of certiorari was filed on September 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's request for credit for presentence confinement was properly dismissed because it was made to a court other than that which had sentenced him?

2. Whether the court below correctly determined that petitioner was not entitled to credit against his sentence for confinement pending appeal because he had filed an "Election Not to Begin Service of Sentence," pursuant to the provisions of then Rule 38(a)(2) of the Federal Rules of Criminal Procedure?

STATEMENT

On August 18, 1950, petitioner was arrested on a charge of conspiring to transmit national defense information to the Soviet Union, in violation of 50 U.S.C. (1946 ed.) 32(a), and bail was set at $100,000. Petitioner did not post bail and has remained incarcerated since that time. Petitioner was convicted by a jury in the United States District Court for the Southern District of New York and on April 5, 1951, he was sentenced to 30 years in prison, the maximum term of imprisonment then provided by the statute.

After the imposition of sentence, petitioner was transferred from the Tombs Prison in New York City, where he had been incarcerated during the trial, to the Federal Penitentiary in Atlanta, Georgia. Petitioner then consulted with his counsel with a view to securing his transfer back to New York pending his appeal of his conviction. In this connection and in accordance with the then existing provisions of Rule 38(a)(2) of the Federal Rules of Criminal Proce-

dure, petitioner signed a document stating that he elected not to commence service of his sentence. Petitioner's counsel specifically requested that this document be made available to petitioner. As a result of the election, on July 20, 1951, petitioner was transferred from Atlanta back to New York City, where he remained until November 19, 1952, when the mandate of this Court following a denial of certiorari was filed with the District Court. Petitioner was then transferred to Alcatraz and is presently serving his sentence in the United States Penitentiary at Lewisburg, Pennsylvania.

By letter dated October 31, 1967, petitioner's counsel requested an opportunity to meet with the Attorney General to discuss "the proper day for termination of the prison sentence now being served by Morton Sobell." On November 13, 1967, petitioner's counsel met with the Attorney General's representatives and requested that petitioner receive credit toward his sentence for the period from August 18, 1950, the date of his arrest, to April 5, 1951, the date of his sentencing, and for the period from July 20, 1951, to November 19, 1952, during which time he was in New York City pending review of his conviction. On January 15, 1968, the Department of Justice notified counsel that:

> After carefully reviewing the matter the Department of Justice has decided that Morton Sobell cannot be given credit administratively for the time he was in jail pending his conviction or while his case was on appeal.[1]

[1] Subsequent to petitioner's commencement of this action, the Bureau of Prisons, in reviewing the computation of time, dis-

On January 18, 1968 petitioner filed a complaint for declaratory judgment and injunctive relief in the United States District Court for the District of Columbia. The government filed a motion to change venue, urging that the case be transferred to the United States District Court for the Southern District of New York. In his opposition to this motion petitioner suggested that if the case were to be transferred he would prefer that it be sent to the Middle District of Pennsylvania. In reply, the government acknowledged:

> Although we adhere to the position that the Southern District of New York is the appropriate district to which to transfer this action, *Stapf* v. *United States,* 125 U.S. App. D.C. 100, 367 F. 2d 326 (1966), we have no objection to the transfer of this case to Lewisburg, if the plaintiff prefers Lewisburg.

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covered that petitioner had not been given credit for the time between the affirmance of his conviction and the denial of certiorari. In accordance with its pre-existing policy to consider an election not to serve as terminating on the date of the affirmance by the court of appeals, it recomputed petitioner's time and granted him credit for the period from February 25, 1952, when his conviction was affirmed by the Second Circuit, to November 20, 1952, when the mandate of the Supreme Court was filed. Petitioner's counsel was advised of this on March 5, 1968.

According to Bureau of Prisons files, petitioner is presently due to be released on August 24, 1969. If he were to receive credit for his pre-sentence time *only*, his scheduled release date would be February 6, 1969. If credit were to be accorded only for his "election" time, that date would be February 14, 1969. If he received credit for both of these periods, his release date would have been August 2, 1968.

The government declared, however, that:

> Since *Stapf* held that the sentencing court is the appropriate body to grant credit for pre-sentence custody, if any is available, we do caution that the United States District Court at Lewisburg may not believe itself appropriate for disposition of the issue of pre-sentence custody.

The government's motion for a change of venue was initially denied, and it immediately moved for reconsideration. On March 28, 1968, the District of Columbia District Court ordered the case transferred to the Middle District of Pennsylvania.

On July 1, 1968, the District Court for the Middle District of Pennsylvania entered an order denying petitioner's motion for summary judgment, granting the government's motion to dismiss for lack of jurisdiction that part of the action which sought credit for pre-sentence custody, and granting on the merits the government's motion for summary judgment as to that part of the action which sought credit for the time pending appeal, during which petitioner had elected not to commence service (Pet. App. A). The court of appeals affirmed, agreeing that the question of pre-sentence custody was one for the sentencing court alone to decide and that the district court had properly denied, on the merits, credit for the confinement pending appeal. One judge dissented in part on the ground that the claim for credit for time pending appeal should also be dismissed for lack of jurisdiction (Pet. App. B and C).

ARGUMENT

1. The questions raised by the petition do not warrant plenary consideration by this Court. With respect to petitioner's presentence custody, the only question raised is that of the court to which a prisoner should direct his plea for credit for such custody. This question is one of limited current importance, since 18 U.S.C. 3568, as amended in 1966 (80 Stat. 217), now requires, as to sentences imposed after the effective date of the amendment, that credit be given for "any days spent in custody in connection with the offense or acts for which sentence was imposed." Moreover, as to sentences imposed after 1960, an earlier amendment to the same section of the Code (74 Stat. 738) gave credit for presentence custody for want of bail in cases under criminal statutes requiring mandatory minimum sentences; lower court decisions, *e.g., Stapf* v. *United States*, 367 F. 2d 326 (C.A.D.C.), have required credit to be given similarly in cases not involving mandatory minimum sentences.

The question whether petitioner can avoid the consequences of his knowing election to defer service of his sentence pending his appeal is similarly limited in importance, since the election procedure in question also ceased to exist by reason of the 1966 amendment to 18 U.S.C. 3568 and a contemporaneous amendment to Fed. R. Crim. P. 38(a)(2).

2. The court of appeals properly held that any claim that petitioner's sentence should be corrected so as to give credit for his pre-sentence custody could be made only in the sentencing court. Such relief may be

sought either under 28 U.S.C. 2255, as the court below suggested, or under Fed. R. Crim. P. 35, relating to correction of a sentence alleged to be illegal; the latter procedure was accepted in *Stapf* v. *United States, supra.* In either event, the procedure is available only in the sentencing court. It is manifestly inappropriate that one district court should purport to correct or change a sentence imposed by another.

Petitioner was sentenced to a term of 30 years at a time when the law provided that, "The sentence of imprisonment of any person convicted of an offense in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence." 62 Stat. 838. The Attorney General's refusal to credit petitioner's pre-sentence custody against his sentence was not an administrative decision but was required by the sentence imposed. If this failure to receive credit for time spent in custody prior to sentencing results in a violation of petitioner's rights, his remedy is to seek to have the judgment of conviction corrected. See *United States* v. *Smith,* 379 F. 2d 628 (C.A. 7); *Stapf* v. *United States, supra,* 367 F. 2d 326 (C.A.D.C.); *United States* v. *Pratt,* 276 F. Supp. 80 (D.N.J.). Petitioner has been and remains free to proceed properly in the court that sentenced him; unless he also were to prevail on his claim to set aside his election pending the appeal from his conviction, petitioner would not be prejudiced by denial of pre-sentence credit until February 6, 1969.

3. When petitioner, with the advice of counsel and in order to be returned to New York from Atlanta, made his election not to begin service of his sentence pending his appeal, Fed. R. Crim. P. 38(a)(2) provided that:

> A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

The courts have uniformly held that under this rule a prisoner is not entitled to credit for time served while an election is in effect. "Having thus voluntarily elected not to serve, service of his sentence automatically ceased, * * * and he may not now complain of the results of his voluntary action." *Allocco* v. *Heritage,* 310 F. 2d 719, 720 (C.A. 5); *Baker* v. *United States,* 139 F. 2d 721 (C.A. 8), rehearing denied, 325 U.S. 894; *Tilghman* v. *Hunter,* 168 F. 2d 946 (C.A. 10); *Shelton* v. *United States,* 234 F. 2d 132 (C.A. 5); *United States* v. *Cortese,* 244 F. 2d 872 (C.A. 2); *Comulada* v. *Willingham,* 351 F. 2d 936 (C.A. 10), certiorari denied, 384 U.S. 973; *Smith* v. *United States and Ramsey Clark, et al.,* Civ. No. 6–3–68 (D.C. Minn., 3d Div.), decided May 1, 1968.

Contrary to petitioner's assertion, the application of this rule here did not unfairly discriminate against him because of his inability to make bail.[2] Petitioner was not denied credit for the time in custody after

[2] In view of the serious nature of the charges against petitioner and the fact that he had fled the country prior to his arrest, the bail of $100,000 was clearly reasonable.

sentence because he was poor but because—with the assistance of counsel—he made a conscious choice to elect not to serve his sentence. Thus, the cases such as *Griffin* v. *Illinois*, 351 U.S. 12 on which petitioner relies are inapposite.

There is no showing that failure of petitioner to be in New York pending the appeal would have rendered ineffective the efforts of counsel in analyzing and arguing from the written record of the trial. If, in fact, there were such circumstances petitioner should have raised them in 1950 in support of a motion that he be returned to New York without an election. Cf. *United States* v. *Daniels*, 377 F. 2d 255 (C.A. 6).

Petitioner's inability to post the bond set by the trial court in 1950 did require him to elect to postpone service of his sentence in order to exercise his choice to remain in New York pending his appeal. As noted, both this Court and the Congress have since taken steps to change this situation. But both the amendment to Rule 38(a)(2) and that to 18 U.S.C. 3568 were prospective amendments, and petitioner's argument that the Constitution requires that they be made retroactive is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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